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CIRCUIT COURT OF ALLEGHANY COUNTY.

KENNEDY V. WESTERN UNION TELEGRAPH CO.*

December, 1904.

1. TELEGRAPH COMPANIES—*Va. Code 1904, sec. 1294h (6)*—"Collect" messages—"Charges due on this dispatch." Section 1294h (6), Va. Code 1904, embraces "collect" messages; and the words "charges due on this dispatch" can refer to no charges other than those for transmission.
2. TELEGRAPH COMPANIES—*Va. Code 1904, sec. 1294h (6)*—Duty to forward "collect" message promptly—Penalty. Under the provisions of sec. 1294h (6), Va. Code 1904, it is the duty of a telegraph company, upon the arrival of a "collect" message, to forward it promptly by messenger to the person to whom it is addressed; and the penalty may be imposed for failure to forward as well as for failure to deliver.
3. TELEGRAPH COMPANIES—*Failure to pay charges.* It being the duty of the company to forward the dispatch by messenger to the addressee, the failure of the addressee to pay charges occasioned either by this neglect, or by the failure of the company to demand payment before delivery, cannot defeat the right to recover the penalty.

Upon an action of debt against the defendant to recover the penalty imposed by the statute for failure to deliver a dispatch as promptly as practicable.

The opinion states the case.

Jno. T. Delaney, for plaintiff.

Fitzhugh Elder, for defendant.

HON. GEO. K. ANDERSON, Judge:

A telegraphic message was delivered to the defendant company at Rockfish, Va., to be transmitted to Covington, Va. The message was addressed to the plaintiff, Mrs. Irene Kennedy, Covington, Va., and was sent "collect," that is, the sender at the time of delivering the message to the defendant for transmission did not pay the charges for transmission and delivery. The defendant, it seems, did not require the charges to be prepaid, and promptly transmitted the message to Covington, at which place it was received about 8 o'clock p. m. Some effort was made by the defendant that night and the next day to locate the plaintiff, but without success, and the next evening, the husband of the plaintiff, hearing by accident

* Reported by George C. Gregory.

that there was a message at the telegraph office for a person named Kennedy, called there and inquired if such a message had been received. The telegram was handed to him. He says he asked if there were any charges, and was told by the operator that there were none. On the blank upon which the message was written appeared the words "collect," but the operator, while denying that he told plaintiff's husband there were no charges, says that he did not demand any, and that none were paid. It also appeared that the custom and regulation of the company is, when sending a message "collect," to require the sender to guarantee payment, and to deliver the message to the sendee, whether the latter pays the charges or not; and upon failure to collect from the sendee the company looks to the operator sending the message to make good the tolls. In this case, the operator at Covington was required by the company to pay, and did pay to the company the charges for this message. The plaintiff brought her action of debt against the defendant for the penalty imposed by sec. 1294h, (6), Va. Code 1904, for failure to promptly deliver the message to her. The case was heard by the court, without a jury. It is clear from the evidence that the message reached its destination, and equally clear that it was not forwarded by a messenger to the addressee, and was not delivered as promptly as practicable, but the defendant seeks to avoid the penalty of the statute, because neither the sender nor the addressee paid the charges for transmitting and delivering the message.

The statute imposing penalties on telegraph companies for failure to transmit and deliver dispatches was first enacted in this state in 1866 (Acts 1865-6, p. 218). That volume of the acts is not before me, but Judge Lacy, in *Tel. Co. v. Reynolds*, 77 Va. 176, says that the act of 1866 had not at that time (1883) been altered or amended and was then contained in the Code of 1873, ch. 65, secs. 2 and 3. Since that time there have been three changes in these sections—first in the revision of the Code in 1887, second by acts 1899-1900, p. 996, and third by the act concerning public service corporations, ch. 8, cls. 5 and 6, acts 1902-3-4, p. 968, now sec. 1294h (5 and 6) Va. Code 1904.

The several changes thus made are interesting and suggestive, and while all of them are not pertinent to the inquiry in hand, they will be noted in passing.

The first section of the act of 1866 applied in terms to telegraph

companies, requiring them to receive messages for transmission and upon payment of the usual charges to transmit the same, promptly as practicable, faithfully and impartially. The penalty for failure was \$100 to the sender alone, and the company "*shall moreover be liable to an action of damages by any party aggrieved.*" In the revision of 1887, the words in italics were left out, and do not appear in sec. 1291, Code 1887, nor do these words appear in the corresponding section 1294h, (5), of Va. Code 1904. The only other change in this section was the addition of words making the law apply to telephone companies; and thus the law relating to the penalty for failure to *transmit*, stands at this time. The changes in the second section of the act of 1866, the section regarding *delivery*, are much more significant. As enacted in 1866, the "delivery" section provided that, "It shall be the duty of every telegraph company, upon the arrival of a dispatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require it to be delivered, or to forward it promptly as directed, where the same is to be forwarded." For failure in this regard, the company forfeited \$100 to the sender, or to the addressee, and moreover was "*liable to an action for damages to any party aggrieved.*"

As carried into section 1292, Code 1887, the only changes in this section were to make it apply to telephone companies, and to strike out the words in italics. It would be interesting to consider the reasons moving the revisors of 1887 to strike out the words imposing liability for damages; but that inquiry is not here necessary. See *N. & W. Ry. v. Irvine*, 84 Va. 553, decided while the Code of 1887 was being revised (February, 1888), and Va. Code 1904, sec. 2900, and cases there cited.

By sec. 2 of the act of 1866, as well as by sec. 1292, Code of 1887, it will be noticed that nothing is said about paying charges as a prerequisite to *delivery*. The statute simply provided that upon receipt of a message at its destination the company must deliver it promptly to the person to whom it is addressed, or forward it promptly as directed, when the same is to be forwarded. Under this section, 1292, as it stood until amended in 1900, a number of cases went to the Court of Appeals, but in not one was the suit brought by the addressee of a "collect" message. Sec. 1292 read alone, and out of connection with the transmission sec. 1291, would

at first sight seem to justify the conclusion that the duty of the telegraph company was to deliver *all* messages as promptly as practicable, whether they were "paid" or "collect" messages. Another view, however, is contended for in some quarters. That is, that sec. 1292, having been enacted under the same enacting clause with sec. 1291, must be read in connection with that section. That, as sec. 1291 says the company shall receive and transmit promptly, faithfully and impartially, any message on which the charges are prepaid, sec. 1292, in requiring delivery, could refer only to such messages as the company was required to transmit. In other words, that the payment required by sec. 1291, was prerequisite not only to transmission, but to delivery as well. A distinguished judge of one of the circuit courts of this state, in writing to me on this subject, says: "As the statute stood prior to this amendment (Acts 1899-1900, p. 996) I very much doubt the right to recover under the second clause (1292) upon a collect message. If prepayment is necessary under the first section, why not as to the second section? The two sections prescribe one continuous duty by the company—transmit and deliver. The two relate to the same subject and must be read together. *Upon payment* the company shall receive and transmit and deliver. But one payment is necessary unless beyond free delivery limits, and the whole statute is based on the idea that upon receiving the message the charge is paid, and not that a message is received 'collect.' Prior to the recent amendment to the statute I do not think that there could be any recovery by sender or sendee unless there was a prepayment of charges."¹

Decisions of the Supreme Court of Georgia tend strongly to support this view. The statute in that state is very similar to ours. The first section prescribes that the telegraph company, "on payment or tender of the usual charge, according to the regulations of such company, shall transmit and *deliver* (italics mine) the same;" while the second section provides that "such companies shall deliver all dispatches to the persons to whom the same are addressed, or their agents, on payment of any charges due for the same." Construing this statute, in a suit by the addressee, for the penalty for failure to deliver, the Supreme Court of Georgia said: "It appears that nothing was paid or tendered when the dispatch was received for transmission, but that it was sent 'collect' and nothing was paid

¹ Hon. R. H. C. Jackson, Judge of the 21st Circuit.

until delivery. . . . By the terms of the act no duty is imposed until payment or tender. Under the first section, the condition upon which the company is required to transmit and deliver is "payment or tender of the usual charge . . . and under the second section there is no duty to deliver, *either at or outside of the company's office, until payment of charges.*" (Italics mine.) *Langley v. Western Union Tel. Co.*, 89 Ga. 222, 15 S. E. 291.

It is probable that the amendment of our statute (sec. 1292) by the act of 1900 (1899-1900, p. 996) was inspired by some decision in the trial courts (and which could not go to the Court of Appeals), to the effect that no recovery could be had by the addressee for the failure of the company to promptly deliver a "collect" message. However that may be, the amendment referred to seems to be aimed at this very point, and the purpose of the amendment was to make it the duty of the telegraph company, not only to deliver, but to make a reasonable effort to give the addressee of a "collect" message an opportunity to pay the charges on such a message before the company could successfully avoid the penalty for a failure on its part to deliver it. If, under the Georgia statute, *no duty* was on the company before payment, then under ours, as it stood before this amendment, the same rule would seem to obtain.

The "delivery" section (1292) of our statute, prior to the amendment of 1900, provided that "it shall be the duty of every telegraph company upon the arrival of a dispatch at the point to which it is to be transmitted by said company to deliver it promptly to the person to whom it is addressed, . . . or to forward it promptly as directed when the same is to be forwarded." For every failure to deliver or forward a dispatch as promptly as practicable the penalty is imposed. The amendment does not change the duty as to delivery, but relates to the duty of the company after the arrival of a dispatch at the point to which it is to be transmitted, and *before* payment of charges, and is as follows: "To cause the same (the dispatch) to be forwarded by a messenger to the person to whom the same is addressed, or his agent, and upon payment of any charges due on this dispatch to deliver it." The penalty is not altered by the amended section. It is \$100 for "failure to deliver or forward a dispatch as promptly as practicable." It is clear that the words of the amendment embrace "collect" messages. As has been seen, this was, to say the least, doubtful before the amendment.

"Charges due on this dispatch" can refer to no charges other than those for transmission.² It was suggested in the argument that those charges might be for messenger service outside of the free delivery limits if the telegraph company. But that idea is clearly negated by the provision of the statute that the company shall only be required to deliver to persons living within those limits. The evident purpose of the amendment was to require the telegraph company, on the arrival of a dispatch, whether the charges had been paid or not, to make reasonable effort to find the addressee if in the delivery limits of the office, so that he might have the opportunity to pay the charges, and have the message delivered to him. In this case, the evidence fails to show that the defendant company made such efforts. The company having failed to do that, incurred the penalty for the failure to forward the dispatch and to deliver it as promptly as practicable. It was not seriously contended that the company, having failed in that particular, could claim immunity from the penalty, because the charges were not paid by plaintiff's husband when he called at the office and got the dispatch after it had been there some 20 hours. From the company's own showing, no charges were demanded. The company can not avoid the penalty for failure to forward and deliver a dispatch to the person to whom it is addressed, by declining to demand the charges due on the delayed message.

I am of opinion, therefore, that under the provisions of sec. 1294h, (6), Va. Code 1904, it is the duty of a telegraph company, upon the arrival of a "collect" message at the point to which it is to be transmitted, to forward it promptly by messenger to the person to whom it is addressed, if he lives in the city or town in which the station is, or the regulations require delivery at that point, and that upon failure so to do, the company is liable to the sender or the addressee for the penalty. The duty of the company is to *forward* "collect" messages, as well as to *deliver* them on payment of charges, and the penalty is for failure to forward as well as for failure to deliver as promptly as practicable. A failure in either duty will subject the company to the penalty. It being clearly the duty of the company to forward the dispatch by messenger to the addressee, the failure of the addressee to pay charges occasioned either by this

² 7 Va. L. Reg. 718.

neglect or by the failure of the company to demand payment before delivery, can not defeat the right to recover the penalty.

The defendant having violated its duty both as to forwarding and delivering the message, must, under the circumstances of this case, pay the penalty of the statute, notwithstanding the fact that the charges on this message were never paid by the sender nor the addressee. The company was not injured by the failure of the sender or the addressee to pay the charges; the operator at Covington was required to pay them, and there is therefore no hardship on the company on this account.

Judgment may be entered for the plaintiff.